No. 21-40137

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAUREN TERKEL; PINEYWOODS ARCADIA HOME TEAM, LIMITED; LUFKIN CREEKSIDE APARTMENTS, LIMITED; LUFKIN CREEKSIDE APARTMENTS II, LIMITED; LAKERIDGE APARTMENTS, LIMITED; WEATHERFORD MEADOW VISTA APARTMENTS, L.P.; MACDONALD PROPERTY MANAGEMENT, L.L.C.,
Plaintiffs-Appellees,

v.

CENTER FOR DISEASE CONTROL AND PREVENTION; ROCHELLE P. WALENSKY, in her official capacity as Director of the Centers for Disease Control and Prevention; SHERRI A. BERGER, in her official capacity as Acting Chief of Staff for the Centers for Disease Control and Prevention; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, Secretary, U.S. Department of Health and Human Services; UNITED STATES OF AMERICA,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Texas

BRIEF OF THE COVID-19 EVICTION DEFENSE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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May 3, 2021

CERTIFICATE OF INTERESTED PERSONS

No. 21-40137, *Terkel v. Centers for Disease Control and Prevention*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Barker, J. Campbell, U.S. District Court Judge
- Barnes, Sr., Joseph Aaron
- Becerra, Xavier
- Beckenhauer, Eric
- Berger, Sherri A.
- Boynton, Brian M.
- COVID-19 Eviction Defense Project
- Degenaro, Carey, counsel for *amicus curiae*
- DiRenzo, Haley, counsel for *amicus curiae*
- Ganjei, Nicholas J.
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- Lakeridge Apartments, Ltd.
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- Mabrey, Javier, counsel for *amicus curiae*
- MacDonald Property Management, LLC
- Myers, Steven A.
- Nadler, Burt, counsel for *amicus curiae*
- O'Leary, Celia Howard
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- Schnapper-Casteras PLLC, counsel for *amicus curiae*
- Schnapper-Casteras, John Paul, counsel of record for *amicus curiae*
- Southeastern Legal Foundation
- Springer, Brian J.

- Terkel, Lauren
- Texas Public Policy Foundation
- U.S. Centers for Disease Control and Prevention
- U.S. Department of Health and Human Services
- United States of America
- Vigen, Leslie Cooper
- Walensky, Rochelle P.
- Walters, Ryan Daniel
- Weatherford Meadow
- Vista Apartments, LP
- Weldon, Chance Dean
- Neumann, Zach, counsel for *amicus curiae*

/s/ John Paul Schnapper-Casteras
John Paul Schnapper-Casteras
Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

The COVID-19 Eviction Defense Project (CEDP) is a non-profit organization that aims to address and prevent mass evictions and homelessness stemming from the coronavirus pandemic. CEDP conducts economic research and data analysis, often together with the Bell Policy Center and the Aspen Institute, and has published several quantitative studies about the current and prospective impact of mass eviction. CEDP also provides direct services to tenants, namely through legal representation and other services for individuals facing evictions, as well as through a rental assistance innovation fund that seeks to stabilize renters and small landlords. Finally, CEDP engages in local advocacy and organizing and works with state legislative and executive branch officials to reform and ensure the effectiveness of eviction protections for tenants and rental assistance policies for landlords.

CEDP has an interest in this litigation because the moratorium issued by the Centers for Disease Control is central to CEDP's mission and work. The district court's far-reaching ruling about the Commerce Clause could have drastic and devastating effects, as the United States faces a nationwide crisis of evictions and

[1] No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

homelessness, at a critical moment during this once-in-a-century pandemic. CEDP respectfully offers its perspective on why the regulation of mass evictions is the regulation of economic activity and on the various ways that mass evictions are interconnected with the national economy and impact interstate commerce.

SUMMARY OF ARGUMENT

This is a time of loss. Myriad Americans have lost a loved one, their job, savings, schooling for their children, a sense of community. We have taken shelter and solace in our homes, sometimes under state order, other times under waves of uncertainty – often just waiting alone. Doctrinally, this appeal is about the finer points of the Commerce Clause. At its core, however, this case is about the one basic thing many people still have left: the home they rent.

The Centers for Disease Control (CDC) has strived to protect upwards of 40 million Americans on the cusp of eviction precisely because casting them out into the street would manifestly worsen the public health crisis and lead to infection, injury, and death. It would also further devastate the national economy. Under two Administrations, and alongside extensive aid to landlords, the CDC's eviction moratorium has blunted the worst consequences of the COVID housing crisis, even in light of the moratorium's significant loopholes.

But just as the country is starting to turn a corner on coronavirus, the moratorium has been struck down here under the sweeping theory that it does not regulate economic activity or substantially affect interstate commerce.

That is flatly incorrect as a matter of both law and economics. Bewilderingly, the district court suggested that rental transactions – codified in commercial contracts, subject to regional and national economic forces, and fueled by monthly payments – are somehow not "economic" in character. Instead, the district court essentially viewed the rental home market as a desert island: miles away from interstate connection, detached from the economy, and unreachable by federal aid. This myopic view of what constitutes an effect on interstate commerce disregarded modern economic data about housing rentals and ignored the inevitable impacts of mass eviction. It also overlooked the fact that mass evictions are inextricably and uniquely intertwined with the nation's current economic and public health crisis, in which upwards of 50 million citizens have filed for unemployment. Not to mention the other interstate dimensions at stake, like the common phenomena of landlords and tenants often renting and working across state lines.

Moreover, as *amicus* has confirmed through its economic research and direct legal services, mass eviction has cascading and calamitous consequences that extend long after a tenant's possessions are piled on the curb. Namely, *amicus* lays out five (5) different types of effects of mass eviction: (1) Once tenants are evicted, they have a harder time finding work, obtaining credit, and securing another rental unit (*economic effects*). (2) They must sleep on friends' couches, move from place to place, or utilize temporary housing or shelters, all of which impedes social distancing and increases the spread of coronavirus (*public health effects*). (3) Some tenants may be forced to live in their car or on the streets, which has other devastating and long-term effects (*homelessness*). (4) Consequently, tenants will need to rely increasingly on public services, such as emergency medical treatment or public housing (*public costs*). (5) Collectively, these events have destabilizing implications for the financial system, as "mom and pop" landlords default on their mortgages, banks take substantial losses on mortgage loans, tenants are haunted by rental debts for years, and third-party investors and debt collectors profit off the situation (*financial impact*).

Amicus respectfully urges this Court to consider this body of economic research and *amicus*' collective experience working with tenants, landlords, and officials on mass evictions. This Court should reverse the district court or, at a minimum, remand for a more accurate analysis of how mass evictions impact interstate commerce or for an evidentiary hearing featuring economists who are well-versed in this field.

ARGUMENT

The CDC's eviction mortarium was originally initiated under the Trump Administration, authorized pursuant to the Public Health Service Act, extended by Congress and then by the CDC during the Biden Administration. It is temporary in nature, nuanced in function, and contiguous with billions of dollars in government aid for landlords. Moreover, the moratorium obviously arises in the midst of a historic and catastrophic public health crisis that has ravaged the country for over a year, infected over 32 million Americans, and killed over 573,000 people (as of May 3, 2021).

None of that apparently mattered to the district court. Instead, the district court jettisoned the mortarium on sweeping Commerce Clause theory that other federals courts addressing the moratorium did not even reach. Specifically, the district court suggested that evictions are not "economic in character," in the first place, ROA.1676-77, and do not substantially affect interstate commerce, ROA.1675, 1677. From *amicus*' perspective, both propositions are deeply flawed as a matter of economics, fact, and law.

I. The district court's constricted application of the "substantial effects" test is irreconcilable with law or economics.

The district court's analysis was erroneous in at least three respects.

First, the premise of the district court's ruling – that evictions are not economic in character – blinks at reality. In fact, it is hard to imagine a more essential economic activity than a home-rental contract: it is the biggest monthly expense for many Americans, *see e.g.*, Lisa Sturtevant, *A Household's Single Largest Expense is Housing*, National Housing Conference Research Note (Oct. 2015), which literally shapes where they work every day, sleep every night, and take shelter in times of crisis. As a fiscal matter, "[l]andlords and tenants typically enter into a financial arrangement in which the tenant may occupy a property in exchange for periodic rental payments." U.S. Br. 14-15 (citing 49 Tex. Jur. 3d Landlord and Tenant § 1 (3d ed. 2021)). As a contractual matter, "[e]victions are a part of the bargain, serving as a contractual remedy for failure to abide by the terms of such rental arrangements." *Id.* (citation omitted). *Amicus*' economic research and experience as a provider of direct legal services to tenants confirms that rental property transactions – and the corresponding risk of eviction – are quintessential economic activities. Indeed, the district court itself admitted that the landlord-tenant relationship is "economic" and has "commercial origin," ROA.1676.

Second, the district court essentially viewed the rental home market as a deserted island – oceans away from interstate connection, untouched by modern civilization or case law, and inaccessible to federal aid. Specifically, the district court reasoned that "[r]eal estate is inherently local" and "[r]esidential buildings do not move across state lines." ROA.1665. Although the district court conceded that "[t]o be sure, the market for rental housing consists of economic relationships between landlords and tenants," ROA.1676, it shifted the analytical microscope to focus in on the incorrect object: "[h]ere, [the expressly regulated activity] is only eviction . . . [since the CDC's] order does not change a landlord's or tenant's financial obligations. . . ." *Id.*

This analysis was also wrong as a matter of economics and law. The CDC moratorium changes the economic relationship between landlord and tenant by requiring it to continue where a landlord might otherwise resort to eviction. Indeed, the district court's Commerce Clause theory could tear down multiple areas of federal law that are well-established and manifestly constitutional. For example, residential mortgages also involve an underlying piece of property and can ultimately result in a form of eviction (foreclosure). Mortgages are subject to a range of federal laws and regulations.[2] Under the district court's logic, regulation of foreclosures, and in particular a foreclosure moratorium, too would involve

[2] *See, e.g.*, 15 U.S.C. § 1601 (Truth in Lending Act); 12 U.S.C. § 2601 (Real Estate Settlement Procedures Act); 15 U.S.C. § 1691 (Equal Credit Opportunity Act); 42 U.S.C. § 3601 (Fair Housing Act); 12 U.S.C. § 5101 (Secure and Fair Enforcement for Mortgage Licensing Act). Foreclosures upon residential mortgages are also subject to various federal restrictions. *See, e.g.*, 12 C.F.R. 1024 (Regulation X). Mortgage providers rely on national credit agencies, work regularly through national banks and intermediaries, and mortgages are often repackaged and resold on national securities markets. When a homebuyer and a lender enter into a mortgage agreement, they are clearly doing so against the backdrop of these nationwide economic dynamics and regulatory framework.

"[r]eal estate [which] is inherently local" and "[r]esidential buildings [which] do not move across state lines," and therefore be impermeable to federal regulation as noneconomic activity. But foreclosures, like rental evictions, are part of an elaborate set of *economic* relationships, and it is those relationships that the order regulates.

Moreover, economic data and *amicus*' experience confirm that rental dynamics and the effects of mass evictions often transcend state lines. Numerous landlords operate and rent out properties in multiple states. For example, the top fifty apartment management firms rent a total of 3,899,797 units nationwide. *See* National Multifamily Housing, *NMHC 50 Largest Apartment Managers* (2021), https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2021-top-manager-list/. These are plainly national commercial enterprises that avail themselves of the benefits of interstate commerce and for which a uniform, set of national regulations is useful and reasonable.

According to the Census Bureau, five of the fifteen largest metropolitan areas span multiple states and feature approximately 1.4 million individuals who are behind on rent -- 563,000 of whom are likely or somewhat likely to be evicted or displaced in the next two months. *See* U.S. Census Bureau, *Week 27 Household Pulse Survey: March 17 – March 29*, https://www.census.gov/data/tables/2021/demo/hhp/hhp27.html (last updated Apr. 7, 2021). In the New York City area alone, "hundreds of thousands of New Jersey residents [] typically commute to New York," *See* Darla Mercado, *New Jersey is latest state to join Supreme Court battle over income taxes on remote workers*, CNBC (Dec. 23, 2020), https://www.cnbc.com/2020/12/23/new-jersey-latest-state-to-join-supreme-court-battle-remote-worker-tax.html (quoting Gov. Murphy). Additionally, Americans frequently rent from a landlord in another state or from a national property management firm. For example, "14% of all Milwaukee rental homes, are now owned by out-of-state landlords," Cary Spivak, *Out-of-state corporate landlords are gobbling up Milwaukee homes to rent out, and it's changing the fabric of some neighborhoods*, Milwaukee Journal Sentinel (Apr. 15, 2021), https://www.jsonline.com/in-depth/news/2021/04/15/milwaukee-rentals-overtaken-corporate-landlords-raking-profits/6989234002/. *See also id*. ("At a time when housing instability — and evictions specifically — are a crisis locally and nationally, the new breed of out-of-staters are more aggressive than most landlords," a study found). Likewise, in *amicus*' experience, tenants in a state like Colorado often rent from landlords who reside in other states such as Montana or California, pay taxes in multiple states, and travel back and forth between states to make repairs and ship materials. Other tenants have moved from one state to another in search of a better job, but are quickly laid off due to the pandemic, unable to receive unemployment due to residency durational requirements, and then evicted.

Third, the district court's analysis was also legally erroneous, for many of the reasons that United States correctly explains in their brief. *E.g.*, U.S. Br. at 16 ("The district court clearly erred in likening the temporary eviction moratorium to the statutes . . . . [that] regulated noneconomic activities—possession of a gun near a school (*Lopez*) and gender-motivated violence (*Morrison*)—and formed no part of any broader protection of interstate commerce."). As the amicus brief on behalf of constitutional law scholars discusses, this district court simply cannot be squared with foundational precedent on the Commerce Clause. *See generally* Br. for *Amici Curiae* Constitutional Law Scholars. In sum, *Lopez*, *Morrison,* and their progeny do not allow courts to selectively pluck any given activity out of its normal economic context, transform it into an abstraction, and place it just out of sight of interstate commerce.

II. Mass evictions during the pandemic have profound economic ramifications that substantially affect interstate commerce.

It is difficult to overstate the gravity of what 40 million Americans, cast out of their homes *en masse*, would mean for the country and for the national economy – especially at the outset of or a subsequent apex of the pandemic. *Amicus*' research confirms that there would be disastrous and cascading effects along five key dimensions: joblessness, public health, homelessness, social services, and the financial system.

1. Economic effects

Evictions both originate from and precipitate economic conditions. In the pandemic, the risk of mass eviction largely stems from the national unemployment crisis, which peaked at nearly 50 million Americans filing for unemployment insurance in summer 2020. Jack Kelly, *Nearly 50 Million Americans Have Filed For Unemployment—Here's What's Really Happening*, Forbes (July 9, 2020), https://www.forbes.com/sites/jackkelly/2020/07/09/nearly-50-million-americans-have-filed-for-unemployment-heres-whats-really-happening/?sh=2515dbaa27d3. "Between March and July [2020], unemployment rates fluctuated between 11.1% and 14.4%. By comparison, unemployment peaked at 10.7% during the Great Recession." Aspen Institute, *The COVID-19 Eviction Crisis: an Estimated 30-40 Million People in America Are at Risk* (August 7, 2020), https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/ (hereinafter, "CEDP-Aspen Report") (citing Bureau of Labor Statistics data). As of August 2020, "[m]ore than 20 million renters live[d] in households that have suffered COVID-19-related job loss." *Id*.

Amid such a historic economic downturn, it is all too easy to fall behind on rental payments. "Thirty percent of renters report using money from government aid or assistance to pay rent, and another 30% indicate that they have borrowed cash or obtained a loan to make rental payments." CEDP-Aspen Report (citing Mackenzie Born, *Rent Payments Increase Slightly in July, but Landlords and Tenants Continue to Struggle*, Avail (updated April 20, 2021)). The impacts are exacerbated by the reality that most Americans already struggle to cover an unexpected $400 expense, *see* U.S. Federal Reserve, *Report on the Economic Well-Being of U.S. Households in 2018 - May 2019*, https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm, and a quarter of Americans have no emergency savings, *see* Quentin Fottrell, *Nearly 25% of Americans have no emergency savings*, MarketWatch (June 9, 2020), https://www.marketwatch.com/story/nearly-25-of-americans-have-no-emergency-savings-and-lost-income-due-to-coronavirus-is-piling-on-even-more-debt-2020-06-03.

The economic origins of the mass eviction crisis are common ground for industry groups and public interest organizations alike. The National Multifamily Housing Council "and the National Apartment Association informed Congress . . . 'more than 25 percent of the households that rent in the US may need help making payments' because of COVID-19 rental hardship, translating to nearly 11 million households and 25 million people." CEDP-Aspen Report (citing Letter from the National Multifamily Housing Council et al. to Speaker Nancy Pelosi and Majority Leader Mitch McConnell, April 7, 2020). *Accord* Amherst Capital, *COVID-19 Relief Helps Some, Leaves Over Half of Households Vulnerable* (2020), https://www.amherstcapital.com/documents/20649/0/Amherst+Market+Commentary+-+May+2020+Issue/b6520038-308f-4708-8ed5-3b678d8ed560 (estimating that 28 million households, totaling 64 million people, are at risk of eviction). These numbers align with early predictions by CEDP and the Aspen Institute Financial Security Program "that 19 to 23 million renters in the United States are at risk of eviction through the end of 2020, representing up to 21% of renter households." *Id.* (citing Katherine Lucas McKay, Sam Gilman, & Zach Neumann, *20 Million Renters Are at Risk of Eviction; Policymakers Must Act Now to Mitigate Widespread Hardship*, Aspen Institute (June 19, 2020)).

Eviction makes it harder for people to return to the workforce, since it is more difficult for people who have been evicted to apply for a job or return to an educational program. *See, e.g.*, Matthew Desmond and Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, Social Problems (2016), https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.sp2016.pdf?m=1452638824. Moreover, "[e]viction makes it more expensive and more difficult for tenants [to] . . . apply for credit, borrow money, or purchase a home." CEDP-Aspen Report (citing National Law Center on Homelessness & Poverty, *Protect Tenants, Prevent Homelessness* (2018)).

Amicus has seen firsthand how evictions impact a tenant's credit score, which can make it very difficult to rent a new home and, in some instances, obtain a job for which a credit check is part of the background check. Many tenants' credit scores have already been hurt by mass layoffs, which have required them to max out credit cards and personal loans. After being evicted, property managers send rental debt to collection agencies to attempt a collection, resulting in a further credit hit when the tenant cannot pay the debt. For instance, one of *amicus*' clients is a student in Colorado, whose mother was a cosigner on her apartment and lives in another state. The property managers continually threatened to send the client's overdue rent to collections, which impacted both her and her mother. Down the line, this affects the tenant's ability to obtain credit or another rental tenancy – let alone eventually transition to owning a home.

2. Public health effects

Next, mass evictions amid a pandemic also demonstrably cause adverse health effects: especially since it is impossible to effectively "shelter in place" if one does not have stable housing in the first place. Being forced to move from place to place, relying on the kindness of friends or older relatives, only increases the propensity of spreading or being infected with COVID-19. Moving one's family into a homeless shelter or group home, while potentially crucial, also often makes it difficult to engage in social distancing, isolation, or quarantine.

As the United States highlights in its brief, "[t]he [district] court did not question the CDC's findings that the eviction moratorium would reduce the spread of COVID-19 and that, absent a moratorium, 30 to 40 million people in the United States could be at risk of eviction, with a significant portion likely forced to move into the types of congregate housing that have seen extensive outbreaks of COVID-19." U.S. Br. 7 (citing 85 Fed. Reg. at 55,294-95).

There are already extensive studies showing that evictions increase COVID-related deaths. *See generally* Kay Jowers et al., *Housing Precarity & the COVID-19 Pandemic: Impacts of Utility Disconnection and Eviction Moratoria on Infections and Death Across US Counties*, National Bureau of Economic Research Working Paper 28394 (2021), http://www.nber.org/papers/w28394; Anjalika Nande et al., *The effect of eviction moratoria on the transmission of SARS-CoV-2*, 12 Nature Communications 2274 (2021), https://www.nature.com/articles/s41467-021-22521-5. "Eviction is linked to numerous poor health outcomes, including depression, suicide, and anxiety, among others." CEDP-Aspen Report (citing Lauren Taylor, *Housing and Health: An Overview of The Literature*, Health Affairs (June 7, 2018)). *See also* Robert Collinson and Davin Reed, *The Effects of*

Evictions on Low-Income Households (Dec. 2018), https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf.

3. Homelessness

Once evicted, renters' "likelihood of experiencing homelessness increases." CEDP-Aspen Report. That, in turn, often leads to "individuals moving into congregate settings, such as homeless shelters, which then puts individuals at higher risk to COVID-19." 85 Fed. Reg. 55292. "[I]f homeless shelters turn away the recently homeless [due to capacity limitations], [they] could become unsheltered, and further contribute to the spread of COVID-19." *Id*. at 55295. Epidemiologically, "[e]xtensive outbreaks of COVID-19 have been identified in homeless shelters." *Id*. Additionally, according to multiple medical studies, "the population of persons who would be evicted and become homeless would include many who are predisposed to developing severe disease from COVID-19." *Id*. at 55295-96.

Needless to say, homelessness can have enduring and devastating second-order effects for one's job applications, economic prospects, and family. "Disconnection from work is a degenerative dynamic – less work, less earnings, less stable living conditions, and further disconnection from work." *See* Economic Roundtable, *Locked Out: Unemployment and Homelessness in the Covid Economy* (Jan. 11, 2021), https://economicrt.org/publication/locked-out/. Likewise, *amicus*' experience providing direct legal services has confirmed the gravity and interstate nature of the impact. For example, one client was a single mother employed part-time in health care. Under threat of eviction, she agreed to leave her home in Colorado rather than be formally evicted, and then had to return to California to put her 12-year-old daughter in the care of her parents. She now lives in her car and "shelters" there with her one-year-old baby.

4. Public infrastructure and services

"The public costs of eviction are far-reaching." CEDP-Aspen Report (citation omitted). *See also* Sam Gilman, *The Return on Investment of Pandemic Rental Assistance: Modeling a Rare Win-Win-Win*, Indiana Health L. Rev. (rev. April 30, 2021) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3829307. "Individuals experiencing displacement due to eviction are more likely to need emergency shelter and re-housing [and public housing], use in-patient and emergency medical services, require child welfare services, and experience the criminal legal system, among other harms." *See* CEDP-Aspen Report. Homelessness deepens the need to rely upon public services.

As a result, "[w]ithout rental income to pay property tax, communities lose resources for public services, city and state governments, schools, and infrastructure, and can expend significant resources managing or disposing of properties acquired through tax foreclosure." CEDP-Aspen Report (citations omitted). State and local budgets are already experiencing significant strains and "are expected to face shortfalls for many years." *See* Louise Sheiner and Sophia Campbell, *How much is COVID-19 hurting state and local revenues?*, Brookings (Sept. 24, 2020). A glut of empty rental properties that generate no tax revenue would only make matters worse.

5. Financial system

Finally, mass evictions also have the potential to destabilize rental markets and the financial system more broadly. Today, the eviction moratorium functions hand-in-glove with government support for landlords, who are only eligible for rental supplements once tenants are unable to pay (and invoke protection under the moratorium by signing a declaration under penalty of perjury that they meet several economically focused criteria).

But without these policies in place, "[m]any property owners, who lack the credit or financial ability to cover rental payment arrears, will struggle to pay their mortgages and property taxes and maintain properties." CEDP-Aspen Report. "Individual investors, who often lack access to additional capital, may be particularly vulnerable. Presently, while 'mom and pop' landlords own 22.7 million out of 48.5 million rental units in the housing market, more than half (58%) do not have access to any lines of credit that might help them in an emergency." CEDP-Aspen Report (citing HUD User, *Landlords* (June 2018)). *See also* Diana

Olick, *Small landlords struggle as renters either can't or choose not to pay amid coronavirus layoffs*, CNBC (April 2, 2020). "In the short term, lack of rental income may result in unanticipated costs, and an inability to pay mortgages, pay property taxes and maintain the property. In the long term, it places small property owners at greater risk of foreclosure and bankruptcy." CEDP-Aspen Report.

Collectively, this could materially affect the national financial system, as debt and distress build upon one another. Landlords would seek to recover rental debts from some tenants or sell off debts to third-party debt collectors, all the while landlords experience financial distress and mortgage foreclosures themselves. *See generally* Kristen Broady et al., *An eviction moratorium without rental assistance hurts smaller landlords, too*, Brookings (Sept. 21, 2020), https://www.brookings.edu/blog/up-front/2020/09/21/an-eviction-moratorium-without-rental-assistance-hurts-smaller-landlords-too/; Jung Hyun Choi and Laurie Goodman, *Mounting Pressures on Mom-and-Pop Landlords Could Spell Trouble for the Affordable Rental Market,* Urban Institute (Nov. 10, 2020), https://www.urban.org/urban-wire/mounting-pressures-mom-and-pop-landlords-could-spell-trouble-affordable-rental-market. The credit scores of tenants would deteriorate *en masse*, further damaging subsequent rentals and prolonging recovery time. The debt collection system would likely be clogged for years with this mass of missed rental payments, which would be repackaged and resold to private investors with a unique interest in pursuing debts or consolidating foreclosures. *See, e.g.,* Gianpaolo Baiocchi and H. Jacob Carlson, *What Happens When 10 Million Tenants Can't Make Rent?*, N.Y. Times (March 3, 2021) ("investors looking to profit from the fallout have referred to this hardship as the 'greatest buying opportunity of the century.'"). Given the scale of the mass evictions on the horizon, this vicious cycle of bad debt (for tenants), bad mortgages (for landlords), and bad economic conditions (for the country) could spiral into a systemic risk in the absence of the CDC's eviction moratorium.

For this reason and others, the Consumer Financial Protection Bureau (CFPB) recently warned that "kicking families out into the street during this pandemic may literally be a death sentence" and promised to "hold accountable those debt collectors who move forward with illegal evictions." *See* CFPB, *CFPB Rule Clarifies Tenants Can Hold Debt Collectors Accountable for Illegal Evictions Bureau Issues Interim Final Rule on Fair Debt Collection Practices Act* (April 19, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-rule-clarifies-tenants-can-hold-debt-collectors-accountable-for-illegal-evictions/. The CFPB also promulgated an interim final rule supporting the CDC's moratorium to provide tenants new protections against debt collectors and their attorneys.

Altogether, there is ample evidence that mass evictions substantially affect the national economy and interstate commerce in numerous ways. To rule otherwise would be to slice and dice the Commerce Clause beyond recognition -- and to almost inexplicably carveout emergency protections for renters at a time when American renters and landlords alike need them most.

CONCLUSION

This Court should reverse, or at a minimum, remand for a more accurate/fulsome analysis of the interstate economic effects of eviction and/or an evidentiary hearing featuring expert testimony from economists.

Respectfully submitted,

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May 3, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Fifth Circuit Rule 29.3 because this brief contains 4,253 words excluding the parts of the brief exempted by Rule 32(f) and Fifth Circuit Rule 32.2.

This brief complies with the typeface requirements of Rule 32(a)(5) and Fifth Circuit Rule 32.1 and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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